IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR APPELLANT BERNARD CAREY

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Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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ARGUMENT

The Appellees, joined by the Roger Baldwin Foundation of ACLU, INC., as Amicus Curiae, raise two sets of arguments against the constitutionality of the Illinois Residential Picketing Statute. One set focuses on the distinction

drawn by the Statute between labor picketing at a place of employment and non-labor picketing; the other focuses on the overall balance the Statute strikes between the privacy interests of residents and the communicative interests of picketers. Appellant Carey urges, however, that neither the appellees nor the ACLU has presented a single case precedent or policy reason which requires striking the Illinois Residential Picketing Statute.

I.

THE STATUTORY DISTINCTIONS BETWEEN LABOR AND NON-LABOR PICKETING ARE CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE.

A. The Illinois Residential Picketing Statute Is Constitutional Because It Treats Different Kinds Of Picketing Differently.

While attacking the distinctions the Illinois Residential Picketing Statute makes between labor and non-labor picketing, the appellees nevertheless agree with Appellant Carey that the constitutionality of these distinctions depends upon their relationship to the state's substantial interest in preserving residential privacy. Brief for Appellees at 8-9. But they assert that a resident's entitlement to privacy at home is not diluted only when the resident hires a domestic worker, but also when he displays a political poster, keeps a pet, or lives in a local landmark. Thus, the argument concludes, if labor dispute picketing regarding the domestic worker is allowed to disrupt residential privacy, the Equal Protection Clause demands that political picketing, picketing by the Anti-Cruelty Society and the like also be permitted. Brief for Appellees at 7-10.

However, the Equal Protection Clause "does not require things which are different in fact . . . to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940). We submit that the differences between labor picketing and the public issue picketing the appellees hypothesize are significant and justify the disparate treatment accorded them in the Illinois Residential Picketing Statute.

By the mere act of voluntarily making his home the situs of an employment relationship the resident does two things which adversely affect his entitlement to residential privacy. First, he brings an outsider into his home for employment purposes, thus diluting his right to privacy *vis-a-vis* that outsider. *See generally,* Brief for Appellant at 21-23. Secondly, he creates focused, substantive rights under federal law, *e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940), as well as under Illinois law on behalf of his empoyee and interested others to picket the residence which is the situs of the employment relationship. *See* Ill. Rev. Stat. 1925, ch. 48, §2a, the Anti-Injunction Act, which generally prohibits enjoining labor dispute picketing at the situs of the labor dispute.* *E.g. Naprawa* v. *Chicago Flat Janitors Unior,* 315 Ill. App. 328, 43 N.E.2d 198 (1st Dist. 1942), *appeal dismissed* 382 Ill. 124, 46 N.E.2d 27 (Ill. Sup. Ct. 1942).

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* Ill. Rev. Stat., 1925, ch. 48, §2a, provides:
"No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats

(footnote continued on following page)

By contrast, the resident who simply displays a poster, keeps a pet or lives in a landmark cannot be shown to have engaged in a course of conduct by which he has voluntarily diluted his own privacy entitlement or created a single right on behalf of any third person which is sufficiently weighty to overcome the resident's general entitlement to be let alone at home.*

Therefore, if the Illinois Residential Picketing Statute accords less favorable treatment to public issue picketers who would picket a home than it does to labor picketers who would picket the home which is the situs of the employment relationship, it is because the rights of the two types of picketers are different. Accordingly the Statute is not unconstitutional simply because it treats things which are different in kind as different in law.

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* *Continued*
or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidabeing upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

* In a similar vein, the ACLU has argued that public officials, specifically the Mayor of Chicago, "waive" their entitlement to residential privacy "by voluntarily choosing to enter the public political arena." Brief for ACLU at 14-16. This assertion has no basis in law and represents unsound policy. Public officials, who give up so much of their personal privacy are entitled at least to privacy within their homes, a single, quiet area of retreat from the demands of their public lives. *See Gregory* v. *City of Chicago*, 394 U.S. 111 at 121-122 (1969) (Black, J., concurring); and *see generally* Kamin, *Residential Picketing*, 61 NWUL Rev. 177, 228-231 (1966).

B. The Illinois Residential Picketing Statute Is Constitutional Under *Mosely* And The Public Forum Doctrine.

The second, and most aggressive attack appellees and the ACLU level against the Illinois Residential Picketing Statute is that it is unconstitutional because under *Police Dep't of Chicago* v. *Mosely*, 408 U.S. 92 (1972), any regulation of picketing in a public forum is unconstitutional if the regulation is tied solely to "the nature of the message being conveyed." Brief for ACLU at 5; and generally at 3-10; Brief for Appellees 10-12. But this argument misstates the operation of the Illinois Residential Picketing Statute, overstates the holding of *Mosely* and mischaracterizes the public forum doctrine.

First, as amicus for Appellant, the New England Legal Foundation, so clearly explains, the choice the Illinois Residential Picketing Statute makes between labor and non-labor picketing is not tied to the message being conveyed alone; it is additionally and inextricably tied to the function of the target residence as a "place of employment." Accordingly, the Statute's distinction between labor and non-labor picketing ought to be viewed as place selective, and not content discriminatory. Brief for New England Legal Foundation at 7-11. It is important to note that the same cannot be said about the choice between labor and non-labor picketing in the *Mosely* ordinance. That choice did, indeed, depend solely upon the subject matter of the picketing, and not also the function of the target school as a place of employment, because every school is a place of employment. Thus, all schools were potential targets for labor picketing.

Secondly, as explained fully in our opening brief, *Mosely* did not create an absolute ban on content-related choices

among picketers. Brief for Appellant at 10-14. The ACLU suggests, however, that the Court's opinion in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), supports its absolutist interpretation of *Mosely.* In *Erznoznik,* the City attempted to convince the Court to sustain an ordinance restricting drive-in theaters from exhibiting movies containing nudity by arguing that the ordinance protected the privacy interests of passersby. In striking the ordinance, the Court characterized it as a content regulation of speech, but did not end its analysis with this characterization. Rather, the Court noted that only two state interests—residential privacy and the protection of a captive audience—had ever been found sufficiently compelling to justify content regulations, and neither was actually served by the Jacksonville ordinance. In this case, by contrast, Appellant Carey has already demonstrated that both residential privacy and captive audiences are protected by the Illinois Residential Picketing Statute. Accordingly, *Erznoznik* strongly supports the position of the appellant, not the ACLU.

Appellees and the ACLU also urge that *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); and *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), dismissed in their briefs as a "dirty words" case, all support their interpretation of *Mosely* as creating a *per se* rule against content-related regulations of picketing. As we have already shown, Brief for Appellant at 11-13, like *Erznoznik* each of these cases stands for the proposition that such regulations survive constitutional scrutiny if the distinctions they draw are shown to be narrowly tailored to advance a substantial state interest, a showing successfully made in *Young* but not in *City of Madison* or *Bellotti.*

Finally, the appellees, and the ACLU rely upon *Hudgens* v. *NLRB,* 424 U.S. 307 (1976), the decision which relieved owners of shopping centers from the burden of tolerating picketing on their private property. As the ACLU correctly notes, in substantiating its holding that a shopping center is not the functional equivalent of a municipality the *Hudgens* majority commented that if the shopping center were a public forum, its owner could not be constitutionally entitled to exclude Vietnam war protesters, *see Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), but required to tolerate protesters against the center's businesses. *Hudgens* at 520-521. However, the logic of this argument does not compel the conclusion, suggested by both appellees and the ACLU, *see* Brief for Appellees at 12 and Brief for ACLU at 6-8, that the public forum doctrine rigidly demands that if a municipality allows picketing about one subject in a given area, it must necessarily allow picketing about all subjects there. Indeed, Professor Harry Kalven Jr., who is universally credited with devising the notion of the public forum for First Amendment activities, explicitly recognized that some topics may be simply "out of order" in some fora, and suggested that the Court develop its own Robert's Rules for determining which subjects may be appropriately raised in given fora. Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 Sup. Ct. Rev., 1 at 23-27. In illustration of this principle, suppose that the teacher who sought to speak at the open school board meeting described in *City of Madison, supra,* 429 U.S. 167, had attempted to deliver a lecture on the fall of the Roman Empire instead of addressing himself to the labor dispute which was the subject of the meeting. Surely neither Professor Kalven nor this Court would have protected the teacher's "right" to deliver the irrelevant lecture, despite the public forum aspect of the meeting. *Id.* at 176-177.

In short, the public forum doctrine is inherently flexible, and it requires that rules about communications in public places reflect *both* the objective of the communicator, as well as the nature and intended uses of the place of the communication and the place to which the communication is targeted. *E.g. Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 304 (1974). In this regard, Professor Kalven seems to suggest that special forum rules ought always to apply where, as here, a communication is directed to an unwilling listener in his home, as the home is generally not a public forum for any purpose.

> " 'Anyone who would thus irresponsibly interrupt the activities of . . . a home, does not thereby exhibit his freedom, Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.' Meiklejohn, *The First Amendment is an Absolute,* 1961 S. Ct. Rev. 245." Quoted in Kalven, *supra,* at 24-25.

We submit that the rules established by the Illinois Residential Picketing Statute, allowing labor picketing, but none other at target homes which are also the places of employment, are consistent with the public forum doctrine as conceptualized by Professor Kalven and applied by this Court.

II.

THE STATUTORY PROHIBITION OF RESIDENTIAL PICKETING IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT.

A. The Appellees' Traditional First Amendment Arguments Are Distinct From The Equal Protection Problem Presented And Are Not Properly Raised At This Time.

Both the appellees and the ACLU have included lengthy arguments raising traditional First Amendment attacks

against the Illinois Residential Picketing Statute's broad prohibition of residential picketing. They each contend that if there is a right of residential privacy it is not sufficiently profound to outweigh the interests of residential picketers —at least not *peaceful* residential picketers picketing the homes of public officials. Brief for Appellees at 14-22; Brief for ACLU at 11-24. Appellees also argue that the Statute is facially vague. Brief for Appellees at 22-26. But we submit that these arguments are not properly raised at this time.

In striking the Illinois Residential Picketing Statute on equal protection grounds, the Seventh Circuit specifically declined to consider whether the Statute could survive a traditional First Amendment attack: ". . . the statute in its entirety must fall and *we need not consider the constitutionality of a prohibition of residential picketing. . . .*" *Brown* v. *Scott,* J.S. App. A p. 8a, n. 6 (emphasis supplied); and *compare Mosely, supra,* 408 U.S. 92, *with Grayned* v. *City of Rockford,* 408 U.S. 104 (1972). In consideration of the Seventh Circuit's limited ruling, we did not include a traditional First Amendment question along with the equal protection question presented for review by this Court. Accordingly it is not properly raised at this time. *NLRB* v. *Sears Roebuck & Co.,* 421 U.S. 132, 163-164 (1975); *Irvine* v. *California,* 347 U.S. 128, 129 (1954).

B. The Illinois Residential Picketing Statute Is A Reasonable "Place" Regulation Of Picketing.

Unquestionably, the equal protection problem presented in this appeal is closely related to the traditional First Amendment issues raised by appellees. As explained in Appellant Carey's opening brief at 10-11, in order to de-

cide the equal protection issue the Court must determine whether the state has a substantial interest in protecting residential privacy; and, if so, whether the statutory distinction between labor and non-labor picketing is tailored to serve that interest. *See, e.g., Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 71. In making these determinations it is necessary to examine the effect of residential picketing on residential privacy in order to test the reasonableness of the labor and non-labor distinction. *See* Brief for Appellant Carey at 20. But it is not necessary to determine whether, irrespective of the labor, non-labor distinction, the prohibition on residential picketing is a constitutional "place" restriction on First Amendment activity.

In other words, the Court *may,* but is *not required* to decide whether "the right of residents to be undisturbed by even 'the classic expressive gesture of the solitary picket', outweighs the picketer's right to use the public streets and sidewalks in residential areas." Brief for Appellees at 16 (internal citation omitted). However, this issue has been thoroughly and excellently briefed by the New England Legal Foundation, as Amicus Curiae in support of Appellant Carey. We will, therefore, not reiterate its arguments, but will limit our response to certain points raised by the appellees and the ACLU.

1. Neither This Appeal Nor The Illinois Residential Picketing Statute Concerns The Education Of Neighborhoods.

In this Court the appellees suggest, for the first time, that the purpose of the residential picketing is to educate the neighbors of the picketed resident, and that the Illinois Residential Picketing Statute is unconstitutional because it

impedes the flow of information into the neighborhood, much like the injunction against pamphleteering overturned by this Court in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1975). Brief for Appellees at 17-20 and 21; Brief for ACLU at 14. But there is no evidence in the record that residential picketers, in contrast to pamphleteers or canvassers, seek to educate or affect anyone but the resident who is the target of their picketing. The appellees in this action represented to the trial court that they wished to picket the residence of the Mayor of Chicago to protest his position on busing (A. 6a, 14a, 15a, 18a, 20a). Not a single appellee represented that his purpose in picketing would have been to educate the Mayor's neighbors, for it is axiomatic that one pickets a public official to pressure him to act in accord with the picketer's goals. *See generally,* Kamin, *Residential Picketing,* 61 N.W.U.L. Rev. 177, 225-230 (1966-1967). The ACLU concedes as much in its argument that the Mayor's home is the only effective place to picket him, because he can ignore a picket at City Hall. Brief for ACLU at 22-24.

In any event, prohibiting residential picketing does not affect a protester's ability to educate a neighborhood. There are other, equally effective and inexpensive methods for disseminating information, including telephone and mailing campaigns, local newspaper articles and advertisements, and door-to-door leafletting, pamphleteering and canvassing. *See, e.g., Martin* v. *Struthers,* 319 U.S. 141 (1941); *Organization for a Better Austin* v. *Keefe, supra,* 402 U.S. 415. Contrary to appellees' assertion, Brief for Appellees at 20, each of these alternative methods is less terrorizing and intrusive than picketing. The resident who wishes to preserve his privacy can hang up on a phone call, *see FCC* v. *Pacifica Foundation,* 438 U.S. 726, 749

n. 27 (1978), disregard offensive mail or newspaper stories, or post signs to deter unwanted callers, *see Village of Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162 (February 20, 1980). But a resident has no effective way to interdict the uninvited picketer patrolling in front of his home, nor is he required to "draw his drapes" or "ignore" the annoying conduct. Brief for Appellees at 16-17; Brief for ACLU at 20. It is well established that unlike the captive audience on the street, the resident made captive by an unwanted communicator, however peaceful, does not bear the initial burden of turning away. *See, generally, FCC* v. *Pacifica Foundation, supra.*

2. The Statutory Exceptions To The Ban On Residen- Picketing Enhance The Constitutionality Of The Illinois Residential Picketing Statute.

Just this term in *Village of Schaumburg* v. *Citizens for a Better Environment, supra,* 48 U.S.L.W. 4162, the Court reiterated earlier suggestions that the right of residential privacy could sustain a narrowly drafted regulation of communicative activity. *Id.* at 4166. *See, e.g. Erznoznik* v. *City of Jacksonville, supra,* 422 U.S. 205; *Cohen* v. *California,* 403 U.S. 15 (1971). Nevertheless, the appellees and the ACLU assert that the right, if it exists, is insubstantial, as evidenced by the "parade of exceptions" which "fatally impeach" the Illinois Residential Picketing Statute. Brief of ACLU at 13 and 17-21; Brief of Appellees at 16. But the exceptions enhance the Statute, for overly broad restrictions on communications are generally disfavored, *e.g. Village of Schaumburg* v. *Citizens for a Better Environment, supra,* and the exceptions recognize carefully selected situations where the resident has elected to dilute his privacy. Brief for Appellant at 21-23.

C. The Illinois Residential Picketing Statute Is Not Unconstitutionally Vague.

1. The Appellees Are Hard-Core Violators Of The Statute And Are Therefore Precluded From Proving Its Facial Vagueness Or Overbreadth.

The appellees' final argument is that the Illinois Residential Picketing Statute should be stricken on the grounds that it is facially vague and concomitantly overbroad where its vagueness extends to areas of constitutionally protected speech. Brief of Appellees at 22-26.

As the Court has often explained, the vagueness doctrine reflects the requirement of procedural due process that criminal statutes give reasonable notice of the conduct prohibited so that would-be violators can conform their conduct to the law, and so that authorities responsible for enforcing the statutes not be vested with unfettered discretion. Where a regulation reaches conduct protected under the First Amendment, the doctrine of facial vagueness also acts to prevent any unnecessary "chilling effect" on free speech.

In recent years the Court has recognized two distinct categories of facially vague regulations. The first is where a challenged regulation by its own terms or as authoritatively construed applies without question to some activities, but its application to other activities is uncertain. The second category is where "the challenged statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971)." *Smith* v. *Goguen,* 415 U.S. 566, 577-578 (1974).

When a vagueness challenge falls into the first category, a person to whom the statute clearly applies—a "hard-core violator," so to speak—may not challenge the statute on the ground of facial vagueness. *Parker* v. *Levy*, 417 U.S. 733, 754-757 (1975); *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 59; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). This limitation on the scope of the vagueness doctrine reflects the notion that one who has received fair warning from a statute of the criminality of his own conduct may not challenge the vagueness of the statute as it might hypothetically apply to others. *Parker* v. *Levy, supra*, 417 U.S. at 756.

It is obvious that the Residential Picketing Statute is not so vague that it specifies "no standard of conduct at all."* Whatever other conduct may fall within its ambit, no person of common intelligence could be left guessing whether patrolling in front of a home with picket signs violates a statute which prohibits residential picketing. *Cf., Connally* v. *General Construction Co.* 268 U.S. 385, 391 (1926). Therefore, if the statute is vague, it is only in the sense that while it clearly applies to some activity, its application to other behavior is uncertain.

The appellees in this action have sought to patrol in front of a citizen's house carrying picket signs. They are, therefore, individuals to whose conduct the Statute clearly applies—hard-core violators. Thus, even assuming some imprecision about the effect of the Statute on others, it is unquestionably applicable to these appellees, and, accordingly, under the rule of *Broadrick* v. *Oklahoma, supra*, 413 U.S. 601, they are precluded from claiming that the Statute is unconstitutionally vague on its face. The Court's rejection of the vagueness challenge to the statute construed in *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 59, applies with equal force in this case:

> "It is clear therefore that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected."

We also submit that the Illinois Residential Picketing Statute should not be declared facially overbroad because of some vagueness which might, hypothetically, be lurking around the Statute's perimeters, as the Court has declared that where, as here, "conduct and not merely speech is involved," a regulation should generally not be declared void for overbreadth except where its overbreadth is "both real and substantial as well, judged in relation to the Statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma, supra*, 413 U.S. at 615; *see also United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 580-581 (1973).

The appellees have not even sought to demonstrate that the potential scope of the Illinois Residential Picketing Statute has either a "real" or "substantial" effect on protected conduct by third persons. Presumably, circumstances could be imagined in which the Statute might deter protected picketing by others. However, no such circumstances are before the Court. Indeed, if such circumstances arose, an overbroad application of the Statute could be cured by a narrowing construction by the Illinois courts.

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* Examples of such pervasively vague statutes are those which prohibit conduct "annoying to persons passing by," *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), or which prohibit treating the American flag "contemptuously." *Smith* v. *Goguen, supra*. 415 U.S. 566.

Erznoznik v. *City of Jacksonville, supra,* 422 U.S. at 216; *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 59.*

In light of these considerations, the Court should not sustain the appellees' procedurally inappropriate attack on the Illinois Residential Picketing Statute.

2. The Statute Is Not Vague Because It Gives Reasonable Notice Of The Conduct Proscribed.

Even if despite *Parker, Broadrick, Young* and *Erznoznik,* the Court proceeds to consider the merits of the appellees' vagueness attack, the appellees still have not demonstrated that the operative terms of the Illinois Residential Picketing Statute are unconstitutionally vague. As noted above, the doctrine of vagueness is reflective of the procedural due process notice requirement. It is, therefore, a doctrine which is an outgrowth of jurisprudential notions of fundamental fairness. However, as the Court has emphasized:

> "It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten* v. *Kentucky,* 407 U.S. 104, 110 (1972).

* The Court is respectfully reminded that these appellees once had a singular opportunity to challenge the constitutionality of this Statute in the Illinois Courts; however, they chose knowingly and voluntarily to forego that opportunity by pleading guilty to criminal charges of violating the Statute (A. 6a-7a, 12a, 13a, 17a, 19a).

The appellees' facial vagueness attack has two aspects. The first focuses on the terms "picket," "before or about" and "residence or dwelling." Brief of Appellees at 23-24.* But to ascribe vagueness to the term "picketing" is nonsensical. Many cases involving conduct described as "picketing" have been before the Court in recent years, and although there may have been uncertainty as to how much constitutional protection the conduct was entitled to, *compare Thornhill* v. *Alabama, supra,* 310 U.S. 88, *with International Brotherhood of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284 (1957), the Court has not had difficulty determining what picketing is. For example, in *Cameron* v. *Johnson,* 390 U.S. 611 (1968), the Court rejected a vagueness challenge to a statute which prohibited " 'picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress. . . .' " *Id.* at 616. Without even focusing on the term "picketing," which was not defined in the statute, the Court concluded that the "statute clearly and precisely delineates its reach in words of common understanding." *Ibid.* See also *Cox* v. *Louisiana,* 579 U.S. 559, 562 (1965).

Neither are the terms "residence or dwelling" vague in a constitutional sense. The Court has often adjudicated First Amendment challenges to state statutes which in-

* We would submit that the appellees' analytic approach to vagueness based upon hypotheticals in the manner of *Baggett* v. *Bullitt,* 377 U.S. 360, 368-370 (1964), is outdated and unhelpful, because the Court no longer analyzes vagueness by resorting to farfetched hypotheticals. *E.g. Grayned* v. *City of Rockford,* 408 U.S. 104, 110 n. 15 (1972); *cf., Smith* v. *Goguen, supra,* 415 U.S. 566.

cluded the term "residence" without commenting on its vagueness. *See e.g., Martin* v. *Struthers, supra,* 319 U.S. 141, *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951). These terms are commonly used in state burglary statutes without rendering them unconstitutionally vague, and they have recognized, precise meanings within the common law of Illinois. *Ezyhorski* v. *Kroska,* 21 Ill. App.3d 79, 84 (1st Dist. 1971).

Finally, "before or about" as used in the Statute to denote proximity are also words of common understanding. They are indistinguishable from the terms "near" or "adjacent" which have both withstood vagueness attacks in First Amendment cases. *Cox* v. *Louisiana, supra,* 579 U.S. at 568-569; *Grayned* v. *City of Rockford, supra,* 408 U.S. at 104. Indeed, couching the proximity limitation in a general term such as "before" or "near" avoids overbreadth problems raised by anti-picketing statutes which set specific foot limitations. *See, e.g., Medrano* v. *Allee,* 347 F. Supp. 605 (S.D. Tex. 1972), *aff'd in part, vacated in part* 416 U.S. 802 (1974).

The second aspect of the plaintiffs' vagueness challenge focuses on the scope of the exceptions to the general prohibition of residential picketing. The appellees have conceded that this appeal is only concerned with the exception for picketing "a place of employment involved in a labor dispute." Brief for Appellees at 6, n. 3. This labor dispute exception must be read in conjunction with the Illinois Anti-Injunction Act, Ill. Rev. Stat. 1925, Ch. 48, §2a, which generally prohibits enjoining picketing in conjunction with "labor disputes." This statute has been construed and applied literally dozens of times, and by now the permissible scope and locations for labor dispute picketing are so well settled as to preclude any finding of vagueness in the "labor dispute" exception to the Residential Picketing Statute.

As to the place of business and public meeting exceptions, we submit that this is not the appropriate vehicle in which to test their vagueness. The appellees have not alleged that they were ever adversely affected by asserted imprecisions in these exceptions, and, as the district court held in *Brown* v. *Scott,* J.S. App. B, 28a-31a, their general intendment is reasonably clear. Under these circumstances, and pursuant to the holding of *Broadrick* v. *Oklahoma, supra,* 413 U.S. at 613 and 615, these exceptions should not be declared facially and fatally vague in this action.

In sum, the Residential Picketing Statute gives adequate warning of which activities it proscribes, and it sets out reasonably explicit standards for those who must apply it. As the Court has repeatedly emphasized in vagueness cases, "there are limitations in the English language with respect to being both specific and manageably brief." *Letter Carriers, supra,* 413 U.S. at 580. Certainly, where, as here, the action was initiated by persons who knew that the conduct in which they desired to engage was prohibited by the Statute they were attacking, the Statute should not be stricken for unconstitutional vagueness.

CONCLUSION

For all the reasons stated herein and in Appellant Carey's opening brief, as well as for the reasons given in the briefs of Amici Curiae in support of Appellant Carey, we urge

that the decision of the Seventh Circuit be reversed, and that this Court hold the Illinois Residential Picketing Statute constitutional.

Respectfully submitted,

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